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Barristers behaving badly: free speech and protection from harassment

Hewson v Commissioner of Police of the Metropolis [2018] EWHC 471 (Admin)

Introduction

Most legal conflicts between freedom of expression and the right to private life are determined within the law of misuse of private information,[1]or, if the speech is claimed to be untrue, the law of defamation.[2] In these cases, the courts have to balance the rights of free speech and the public right to know with the privacy rights of the other party and must ensure that those rights are not interfered with disproportionately.[3] Further, in those cases, a public interest defence will be available to ensure that freedom of expression and the public right to know is not interfered with unreasonably.[4]

However, other legal remedies exist for those who feel that their privacy or other interests have been affected by the speech or actions of others; and in a number of cases claimants have used the law of harassment, contained in the Protection from

[1] *Campbell v MGN Ltd* [2004] AC 457

[2] See now the Defamation Act 2013, which augments the common law of defamation.

[3] See *S (A Child) (Identification: Restrictions on Publication), Re* [2004] UKHL 47, which insists that neither free speech nor privacy be given any predominance when in conflict; the dispute being settled by applying proportionality.

[4] The defence of public interest has always been available in the law of confidentiality and misuse of private information and a specific public interest defence is now contained in s.4 of the Defamation Act 2013.

Harassment Act 1997, to control what is alleged to be abusive or other harmful actions and speech.[5] The Act does have a reasonableness defence, in s.1(3), so the courts are able to take into account free speech norms and balance free speech with the other interests of the claimant, and this defence has been employed on a number of occasions, sometimes with success.[6]

The Act was employed successfully in a recent decision of the High Court,[7] which dealt with rather unusual facts – a claim made by one barrister that another barrister had been tweeting offensive messages to her following a lengthy exchange of views and insults exchanged between the two. This case note will examine the case with a view to discovering whether the tenets of free speech are fully applicable to cases involving harassment, and whether free speech is given sufficient protection when it conflicts with the right of the claimant not to be subject to harassment. As we shall see, the free speech arguments might be a good deal weaker once the threshold for harassment has been satisfied, making it unlikely, in most case, that the free speech will trump the victim's interests.

The Protection from Harassment Act 1997

For the purposes of the examination of *Hewson*, s.1 of the Act provides as follows:

[5] Such actions are particularly popular in controlling the tactics of demonstrators when they attack commercial companies and their employees. This aspect and the cases are dealt with later on in the case note.

[6] See the cases detailed in the analysis section of this piece, below.

[7] *Hewson v Commissioner of Police of the Metropolis* [2018] EWHC 471 (Admin)

(1) A person must not pursue a course of conduct—

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section the person whose course of conduct is in question ought to know that it amounts to [or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to [or involved] harassment of the other.

(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

The facts and decision in *Hewson*

In this case a practising barrister sought judicial review of a police decision to issue her with a prevention of harassment letter (PHL) under the Prevention of Harassment Act 1997. For some months, the barrister, who was also a legal writer who contributed articles in the legal and non-legal media, had been involved in an online dispute with another practising barrister, the complainant. Initially, the exchanges were concerned with the barristers' differing views on child abuse cases, but between

autumn 2016 and February 2017, the barrister posted a number of what the complainant regarded as abusive "tweets" on the social media site "Twitter", and posted online messages and sent emails to the complainant's chambers and associates which the complainant regarded as abusive.[8] Her conduct continued despite the complainant sending letters before action and complaining to the police and the Bar Standards Board.[9] On 23 February 2017, a police officer telephoned the barrister to arrange for her to be interviewed under caution. However, the call was cut off before an interview could be arranged. Thereafter, the barrister posted further tweets referring to the complainant,[10] and the police decided to issue a PHL without interviewing her.

The barrister did not dispute that she had posted tweets that were expressed in strong language and were extremely pejorative of the complainant. However, she contended that she had done so in the context of a campaign of harassment by the complainant, and that her tweets were simply "tit for tat." Thus, she claimed that her tweets had to be seen in the context of her allegation that she was being the subject of cyber-stalking by the complainant, and that the complainant was complaining to the police and other authorities to deflect any criticism of her behaviour. The barrister also argued that issuing the PHL violated her rights of private life (under article 8 ECHR

[8] The tweets included one accusing the complainant of being a "malicious crackpot" and "unhinged".

[9] Many of these tweets referred to the claimant's allegation that the complainant was launching a cyber-attack on her, through anonymous tweeters, which later formed the basis of the claimant's case, below.

[10] These tweets, amongst other things, called the complainant "evil" and "dodgy", and suggested that the complainant had made a "malevolent intrusion into my private life acting in concert with #Trolls #Evil".

and freedom of expression under article 10 ECHR). She also claimed that the process followed by the police lacked effective procedural safeguards and breached her legitimate expectation that, before issue, she would be interviewed under caution and given the opportunity to tell her side of the story.

In the High Court, Dove J refused the application. Dealing firstly with the complaint under article 8 ECHR, the judge recognised that the issuing of a PHL was neither authorised nor governed by statute, and stemmed from the wide discretion afforded to the police in carrying out their duty of enforcing the law.[11] Further, it was accepted that the court would interfere with the exercise of that discretion only in extreme cases.[12] The judge stated that while the issue of a PHL was justified by reference to the ingredients of the offence of harassment set out in s.1 of the 1997 Act, it nevertheless constituted an interference with the recipient's rights under article 8(1) ECHR.[13] Accordingly, the proportionality of that interference in any given case would depend on the circumstances and an assessment of the nature of the PHL and the process leading to its issue.[14]

The judge noted that there was a public dimension to the case in that views published on social media were in the public domain, and there had been coverage of the dispute

[11] *Hewson v Commissioner of Police of the Metropolis* [2018] EWHC 471 (Admin), at paragraph 23, following *R. v Commissioner of Police of the Metropolis Ex p. Blackburn (Albert Raymond) (Order of Mandamus)* [1973] QB 241

[12] *Ibid.*

[13] *Hewson v Commissioner of Police of the Metropolis* [2018] EWHC 471 (Admin), at paragraphs 23-25

[14] *Hewson v Commissioner of Police of the Metropolis* [2018] EWHC 471 (Admin), at paragraphs 33-35

between the claimant and the complainant in the national media. Further, while it was important to bear in mind the implications for the barrister's reputation, that factor was considerably tempered by the fact that a PHL was merely a warning, did not involve any formal determination, and carried no imputation that the conduct alleged had actually taken place. It was, therefore, not a determination that the offence of harassment had been committed.[15]

In terms of procedural fairness, the judge noted that it might be good practice to speak to potential recipients before issuing such orders, although fairness did not require that that should happen in every case; and it did not require that the claimant should have been interviewed in the instant case. By mid-February 2017, the claimant was aware that the police were investigating an allegation made against her by the complainant, and when she was contacted by the officer on 23 February she clearly drew the inference that his enquiry was a consequence of that complaint. Given that her social media communications continued in the same vein, the decision to issue the PHL without further investigation was understandable. In the circumstances, therefore, the interference with the claimant's article 8 rights was proportionate and pursued the legitimate aim of drawing her attention to the fact that her social media communications were said to be causing the complainant distress and alarm.[16]

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[15] *Hewson v Commissioner of Police of the Metropolis* [2018] EWHC 471 (Admin), at paragraphs 36-37, and citing *R. (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2013] EWCA Civ 192

[16] *Hewson v Commissioner of Police of the Metropolis* [2018] EWHC 471 (Admin), at paragraphs 34-35. His Lordship then went on to conclude that even if she had been interviewed, it was difficult to accept that she could have affected the officer's judgment. The PHL was simply notifying the barrister

The judge dealt with the article 10 issue without too much debate. Recognising that the discussion on article 8 fed into the claim under article 10, the judge stressed that it was important to remember that article 10 was a qualified right, capable of being restricted in the interests of the prevention of disorder or crime. Although the PHL interfered with the barrister's article 10 rights, that interference was proportionate, and the principles of common law fairness did not lead to any different conclusion.[17]

Analysis

As stated above, the High Court dedicated little time to assessing the value of the claimant's free speech or balancing it with the complainant's interests in private life. Given that the court accepted the complainant's story regarding the dispute between the two barristers this is hardly surprising, as the claimant's speech, once the initial exchanges were made, could be said to have little if any merit in free speech terms. Yet, there are other obstacles to protecting free speech in actions brought under this legislation.

One difficulty facing free speech in cases such as the present is convincing the court that such speech, couched in a crude and potentially abusive manner, is indeed speech

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of the allegations, and her providing her side of the story would not necessarily have obviated the justification for its issue (at paragraph 40)

[17] *Hewson v Commissioner of Police of the Metropolis* [2018] EWHC 471 (Admin), at paragraphs 38-40. His Lordship further held that the police had not promised that the barrister would be interviewed before issue, and it was not procedurally unfair and disproportionate for there to have been no interview (at paragraphs 42-44).

worthy of protection. In this respect both the domestic and European courts have established that generally article 10 covers every view, however objectionable or offensive.[18] For example, in *Livingstone* v *Adjudication Panel for England*[19] it was accepted that when Ken Livingstone (the then London Mayor) had accused a Jewish reporter of being a concentration camp guard, there had been an interference with his free speech which could not be justified unless he had acted unlawfully or there were otherwise satisfactory reasons to sanction him.[20] In contrast, in *Gaunt v OFCOM*,[21] where a radio presenter had referred to a guest as a 'Nazi' and an 'ignorant pig.' It was held that although the presenter would be protected when he used offensive expression when interviewing a public official, such protection did not apply to gratuitous offensive insult or abuse or to repeated abusive shouting that served to express no real content. The decision in *Gaunt* stresses that it is not the words themselves which lost protection, but the lack of context in which they were used. In other words, speech should make some contribution to a debate or idea, as opposed to mindless and unfocused words.[22] In *Hewson*, therefore, although the claimant was initially involved in a genuine debate on a matter of public interest, her subsequent

[18] *Handyside* v *United Kingdom* (1976) 1 EHRR 737.

[19] *The Times*, 9 November 2006; on the facts, it was held that the legislation, s.52 of the Local Government Act 2000, did not apply to conduct by public figures in their private lives.

[20] The court found that the comment had been made by Livingstone as an individual rather than as a public officer and it was unlikely that the public would think that he had brought his office into disrepute because of that comment.

[21] [2010] EWHC 1756 (Admin).

[22] Although it could be argued that Livingstone's remark made no contribution to any debate, it should be stressed that the question in that case was whether he had brought the office into disrepute when making that statement in his private capacity.

messages could be described as mere vulgar abuse, attracting little protection from the courts. [23]

Although the courts often have to balance a person's privacy against another's right to free speech, the domestic courts have vigorously protected individuals from what they regard as unreasonable harassment; this being the essential purpose of the 1997 Act. Thus the courts will ensure that the victim is not subjected to undue distress, even where the purpose of the communication was to engage in political or other debate and to raise matters of public interest. This obviously impacts on the extent of free speech claims, and the availability of any reasonableness defence under s.3, for if the threshold of harassment is met (by the occasioning of undue distress), then it may be difficult for the free speech argument to override the privacy interests of the victim. Accordingly, once a person's tactics have caused the relevant amount of distress, despite the fact that those tactics were initially employed to pursue a genuine free speech purpose, it will be difficult for the courts to dismiss the harassment claim and to truly balance free speech with the right not to be harassed. For example, in *Howlett* v *Holding*,[24] it was accepted that an order under the 1997 Act could be made even where the defendant was exercising his right of freedom of expression, and the subject of that free speech was a matter of genuine public debate. In *Howlett*, the defendant

[23] Thus, in *Sanders* v *Kingston* [2005] EWHC 1145, it was held that a local councillor who made uninformed comments about deaths in Northern Ireland, calling on the people of Northern Ireland to apologise for killing soldiers and to hang their heads in shame for involving the English in their own quarrel, did not attract the special protection afforded to political speech because it was not an expression of his political opinion but merely his personal opinion. It was nevertheless recognised as speech under article 10 so as to protect him from disproportionate penalties.

[24] *The Times*, 8 February 2006.

had pursued a campaign against the claimant - a local councilor - after she had spoken out against the defendant in a planning application. The campaign involved flying abusive and derogatory banners and dropping leaflets from his aircraft, and placing her under surveillance in order to see whether she was committing benefit fraud. The court held that the anguish suffered by the claimant was out of all proportion to the value attached to his right of free speech and was thus a necessary restriction under Article 10(2).[25]

This approach makes it difficult to attach appropriate weight to free speech arguments, as the tactics employed by that person leads the court to concentrate on the protection of the victim. This is supported by the decision in *Thomas* v *Newsgroup Newspapers*,[26] where it was held that it was not the conduct that made up an offence of harassment, but rather the effect of that conduct. Further, with respect to the motives of the action, it was for the defendants to show that the motive for their actions were reasonable, reasonableness being dependent in each case upon the particular circumstances. This suggests that in harassment cases (as opposed to privacy cases where in the balancing process both claims start on an equal footing, even where the claimant has been found to enjoy a reasonable expectation of privacy) the defendant in a harassment claim will find it more difficult to justify their actions on free speech grounds.[27]

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[25] See also *R* v *Debnath* [2005] EWCA Crim 3472, where it was held that a restraining order prohibiting the defendant from publishing any information about the complainant or his fiancée, irrespective of whether it was true or false, was not in breach of article 10.

[26] [2002] EMLR 4.

[27] In *Thomas*, a newspaper had published an article explaining how police officers had been disciplined after making racist comments about an asylum seeker. The claimant received a good deal of hate mail,

One instructive case that the court in *Hewson* did mention, albeit in passing, is the decision in *Ware v McAllister*,[28] involving an ongoing dispute between a journalist and a property developer. In this case the claimant applied for a final injunction under the 1997 Act restraining the defendant journalist from harassing him. In 2002, the claimant had been involved in the development of a site and had been responsible for the site's safety. The defendant had investigated the site and taken photographs showing that it was dangerous and wrote a series of online articles about its condition, outlining the dangers that it posed to the public. As a result, the local authority became involved and the site was cleared up. It was accepted that from then onwards, neither that site, nor any others owned by the claimant, posed a danger to the public. In 2004 the claimant asked the defendant to take the articles down; which he refused to do and in 2011 the claimant instructed lawyers. Consequently the defendant updated his articles and began making criticisms of the claimant to various public authorities and clubs which the claimant was associated with. The defendant was convicted of harassment and was prohibited from publishing anything about the claimant, although he continued to do so in any event. On appeal, that prohibition was lifted, but the defendant reacted by increasing his campaign and began to distribute flyers showing unflattering pictures of the claimant. The defendant submitted that the articles were true and in the public interest. He further submitted that it was

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which, she claimed, had caused her considerable distress. Refusing to strike the action out, the Court of Appeal held that the publication of press articles calculated to incite racial hatred of an individual was a course of conduct capable of amounting to harassment under the 1997 Act. In the court's view, the reference in the articles to the claimant's colour was not reasonable and it was foreseeable that *Sun* readers would send hate mail after the article was published.

[28] (2015) QBD, 24 July/2015

fundamental under article 10 ECHR that he should not be bullied into silence by a more powerful person.

After establishing that the continued conduct of the defendant clearly constituted harassment, the court then considered the article 10 rights of the defendant and whether his conduct was reasonable under s.1(3) of the Act. In the Court's view, where the words were journalistic, then the question of whether the conduct was reasonable concerned the balance between the claimant's article 8 and the defendant's article 10 rights: the justifications for interfering with each right had to be taken into account and the proportionality test had to be applied to each. The claimant's case was strong: for 13 years he had been subjected to grave public criticisms in strong and vilifying terms. It had grown more severe over the years as every attempt to restrain it had been treated as a further provocation justifying further criticism. Even a criminal court's restraining order had been ignored, and once it was lifted, the campaign had gathered renewed force. It was, in the Court's view, akin to stalking and the claimant had been caused severe anxiety and distress and his article.8 rights were very substantially engaged.

As for the defendant's article 10 rights, the original articles had been legitimate exercises in public interest journalism. However, by 2015, it was hard to see that there was any public interest or any other legitimate reasons for the campaign. The fact that at least some of the allegations were true was a significant point in the defendant's favour, but it was not a trump card. Since 2002, the site had remained safe and past public interest had evaporated almost completely. There was no continuing future public interest in publication that was sufficient to outweigh the claimant's article 8

rights. The court stressed that article 10 was a qualified right and those who wanted to exercise their article 10 rights had a countervailing responsibility to show that if the words were injurious to others there was sufficient justification for them. On the facts there was little justification for permitting the defendant to exercise his article 10 rights in a manner plainly injurious to the claimant. As to proportionality, what had started as a legitimate exercise in public interest journalism had become almost a personal vendetta, based on a desire to reinforce the defendant's own sense of personal worth. It was not a conflict between public interest journalism and private interest, but purported public interest journalism against substantive article 8 rights and the balance clearly lay in favour of granting relief.

The decision in *Ware* indicates that greater strength will be given to the free speech arguments if they are journalistic in nature, and where the purpose of the speech remains journalistic and a matter of public debate. This is reflected in s.12(4) of the Human Rights Act 1998,[29] and the court in *Ware* was clearly influenced by the fact that the defendant was, at least initially, pursuing a journalistic goal. Although many would argue that the defendant's speech remained journalistic, the court felt that the public interest nature of the stories had diminished with the defendant's unnecessary and private vendetta.

In *Ware*, the journalist had, thus, exhausted his professional immunity and the public interest in the story, and thus lost the battle between free speech and the interests of

[29] Section 12(4) provides that where the speech in question is of a (journalistic) nature the court must have regard, inter alia, to the extent to which it is, or would be, in the public interest for the material to be published.

the claimant. Nevertheless, until that time the court displayed a greater deal of tolerance than would be expected in cases not involving the press. This preference was also evident in the case of *Trimingham v Associated Newspapers*,[30] where the court offered a high level of editorial judgement when a newspaper had written several articles about the claimant's affair with an MP, often referring to her sexuality and making comments about her masculine appearance. In the court's view, discussion or criticism of sexual relations which arose within a pre-existing professional relationship which involved the deception of a spouse, or civil partner or others with a right not to be deceived, were matters which a reasonable person would not think was conduct amounting to harassment and would think was reasonable.[31] Whilst she suffered distress about insulting and offensive words used about her and her appearance, it could not be accepted that the defendant ought to have known that its conduct in relation to that language would be sufficiently distressing to be considered as oppressive or amount to harassment.

The *Trimingham* case can of course be explained on the basis that it involved the private lives of 'true' public figures, and that the details related to matters of true public interest – that the affair cast doubt on the fitness of both persons to hold public office and to carry out their respective functions responsibly. Nevertheless, the case clearly provides the press with a wide area of editorial discretion in how these matters are reported and what language is employed in relaying the story to the public; and

[30] [2012] EWHC 1269 (QB)

[31] The public therefore had an interest in knowing whether they could trust them both not to deceive them and had an interest in knowing how the personal life of a leading politician was likely to affect the business of government

this was enough to defeat not only the privacy claim but the action under the 1997 Act. That editorial judgment and press freedom are not unlimited is clearly seen in the *Ware* judgment, and once the journalist lost sight of his duties as a journalist the defence under s.1(3) of the Act was also lost.

The principles of journalistic freedom are not restricted to the press in cases under the 1997 Act and in *Merlin Entertainments LPC v Cave*[32] the court refused to grant an interim injunction restraining a defendant from sending mass emails and setting up websites on which he campaigned on the issue of safety in theme parks and criticised the companies involved in running the parks. In this case after an accident at one of the claimant's parks where a child was seriously injured, the defendant and his company were retained to provide a confidential report. There was a dispute regarding payment for the report and subsequently the defendant sent a series of emails criticising the claimant's company and its employees. He also engaged in mail drops to local residents and businesses. In the proceedings the defendant argued that the case raised an important issue about the lawfulness of campaigns which, if their content was correct, were in the public interest.

In the court's view, the course of conduct relied on did not amount to harassment and the claimants had not satisfied the court that their substantive claim was more likely than not to succeed at trial. The real question for the court was whether the conduct complained of had extra elements of oppression, persistence and unpleasantness.[33]

[32] [2018] EWCA Civ 612

[33] See also *Mainwaring v Associated Newspapers*, unreported (2017) QBD), 2 July 2017, where part of a harassment claim was struck out insofar as it concerned contact between newspaper reporters and the

The court also had to ensure that any relief sought, while restraining objectionable conduct went no further than was absolutely necessary in interfering with the defendant's article 10 rights. In this case, there was no evidence of any threatening or abusive communications; rather, they contained, at times, strong criticism, which was quite a different thing. In the court's view there was no basis for a blanket prohibition on any communication with or about the companies' officers, employees or agents. An order in those terms would interfere with the defendant's article 10 rights. The conduct of the defendant might be annoying or irritating, but it was not conduct grave enough to be a crime.[34]

However, the success of freedom of expression witnessed in the press freedom and related cases, above, has not been as evident in cases where the Act has been used against protestors. Originally it was thought that the legislation was not appropriate in cases where the defendant was exercising his or her right to demonstrate. Thus, in *Huntington Life Sciences* v *Curtin*[35] it was held that the Act was clearly not intended

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claimant, who had painted her property with large red and whites stripes in the course of a planning dispute. The reporters' conduct (of following up on the story) had been well within the range of options open to responsible journalists following up a story, and it was relevant that the painting had been a public gesture likely to attract attention.

[34] See also the Northern Ireland case of *Fulton v Sunday Newspapers* [2017] NICA 45, where a newspaper had established that its approach to publishing articles about the appellant was reasonable in the circumstances. In the court's view, there was a public interest in exposing alleged paramilitary influence in a loyalist area of Belfast which the investigations conducted by the newspaper had uncovered.

[35] *The Times,* 11 December 1999.

by parliament to be used to clamp down on the discussion of matters of public interest or upon the rights of political protest and public demonstration which were so much part of our democratic society. However, where there is evidence that protestors have taken part in actions of harassment then the Act clearly applies and it may be difficult for the defendant to rely on the defence of reasonableness. For example, in *DPP* v *Moseley, Selvanayagam and Woodling*[36] it was held that the provision could be applied in the context of demonstrations. In this case, one of the defendants had been served with a temporary injunction under s.3 of the Act and had continued to demonstrate against the fur trade at a fur farm. The defendants were charged with an offence under s.2 of the Act and sought to argue that their conduct was reasonable in all the circumstances. Although this plea was accepted at first instance, the High Court held that the defendant who was subject to the original order was precluded from relying on the defence as she had clearly broken the term of the original injunction.[37]

Further, in cases not involving press freedom or a strong public interest in free speech, the courts are unlikely to side with free speech, particularly once they are satisfied that there is a strong *prima facie* claim for harassment. This is evident in *Hewson*, where the free speech arguments are based on nothing more than a desire to continue a personal feud, which on the facts has gone too far and descended into abuse and harassment. In these cases, there is little if any public interest to justify the expression

[36] *The Times*, 23 June 1999.

[37] Similarly, in *Silverton and Others* v *Gravett and Others*, unreported, decision of the Queen's Bench Division 19 October 2001, the High Court stressed that the rights under articles 10 and 11 were not absolute and could be restricted by the domestic law to prevent disorder or crime or to protect the reputation and rights of others.

in terms of article 10 and the defendants will not be able to rely on the leeway granted to robust and strong speech used in the context of public interest debate. Thus, in *Brand v Berki* [38] it was held that the balance of convenience favoured the continuation of an anti-harassment injunction granted to a well-known couple to prevent a professional masseuse from continuing a concerted email campaign, numerous Twitter posts and internet publicity alleging that the couple had committed serious criminal offences. In the court's view, the conduct amounted to harassment within the 1997 Act, the masseuse had known that her conduct would cause the couple alarm and distress, and there were no defences available to her.[39]

In addition, it should not be forgotten that the proceedings in *Hewson* were not of a criminal or civil nature, involving as they did a mere warning to the claimant of her past and future behaviour. Thus, in the present proceedings, as there had not been either a criminal charge or formal civil proceedings issued under the Act, the court was not asked to make a definitive ruling on the balance between the right to free speech and the victim's right of protection under the Act; rather the issue was whether the PHL, which had followed investigations into the allegations, had been made lawfully. That is not to say that articles 8 and 10 had not been engaged, and it is still

[38] [2014] EWHC 2979 (QB)

[39] See also *AXB v BXA* [2018] EWHC 588 (QB), where injunctions restraining an individual from harassing a married man and disclosing private information about their affair were made where she presented a continuing risk of embarrassment and distress to him and his family. There was a reasonable expectation of privacy regarding information about sexual activity, and although that expectation could be outweighed based on other considerations, the mere fact that someone wished to publish an account of their own life did not provide a sufficient entitlement where to do so would engage ECHR article 8 rights of another person who had not given consent.

important to assess the extent to which free speech arguments will fare in proceedings under the 1997 Act, and the compatibility with article 10 of such cases.

Conclusions

In terms of measuring the weight given to freedom of expression in cases brought under the Prevention of Harassment Act 1977, the case of *Hewson* offers little for reflection. The free speech strengths of the claimant's claim were very low and the court gave little consideration to the balance of free expression versus the rights of the complainant. This was primarily because the claimant had neither been formally charged nor had civil proceedings brought against her and thus the court did not have the task of balancing free speech with the complainant's interests and protection from harassment.

However, by examining previous case law we have been able to conclude that the article 10 rights of people who have allegedly committed acts of harassment under the 1997 Act will be robustly safeguarded provided there is some discernible public interest in that speech. Whether such protection will be as favourable as that on offer in cases involving privacy claims is however questionable, as in the latter cases a finding of legitimate expectation simply begs the question whether there is an overriding public interest in publication; whereas a finding of harassment indicates that the conduct and speech has gone beyond the acceptable. Further, when that speech has little public interest merit - in other words does not beyond the public's curiosity in being informed of a private dispute - it is likely that the court's finding that the defendant's conduct amounts to harassment will be followed by its rejection

of the reasonableness defence under s.1(3). This is true of cases brought under other offences, where an initial finding that the offence has been committed is likely to lead to the rejection of any free speech defence.[40]

Arguably, had the parties involved in our case been warring politicians rather than feuding barristers, the court may have given the claimant greater discretion in expressing her views about the complainant than they did.[41] However, whether the parties are politicians are not, it appears that the greater the public interest of the speech, the greater chance it has of being protected, even in harassment claims. In this respect once the speech loses its value as a matter of public debate, perhaps because it has been overtaken by private motive or become mere vulgar abuse, then that speech is unlikely to be protected.

[40] For example in cases brought under ss.4 and 5 of the Public Order Act 1986: see *DPP v Clark* [1992] Crim LR 60 and *Norwood v DPP* [2003] EWHC 1564 (Admin).
[41] See for example *Oberschlik v Austria* (1995) 19 EHHR 389, where a politician was referred to as a Trottel – a fool. See also *Livingstone* v *Adjudication Panel for England, The Times,* November 9 2006, where abusive speech was given some protection; contrast *Sanders v Kingston* [2005 EWHC 1145.